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No. 06-779

Supreme Court, U.S.
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In The
Supreme Court of the United States

UNIVERSITY OF PUERTO RICO,

Petitioner,

v.

IVAN TOLEDO and the
UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND ELEVEN OTHER STATES AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICI

"An integral component of that 'residuary and inviolable sovereignty' retained by the States is their immunity from private suits," *Federal Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002). This immunity, which is confirmed by the Eleventh Amendment, U.S. Const. amend. XI, protects the States from suit altogether unless one of the narrow exceptions applies. *See Green v. Mansour*, 474 U.S. 64, 68 (1985). Sovereign immunity does not exist solely in order to "preven[t] federal-court judgments that must be paid out of a State's treasury," *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994), but precludes "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (internal quotation marks omitted). Indeed, sovereign immunity bars suits against the States by Indian Tribes, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 773, 782 (1991), foreign nations, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330-32 (1934), and corporations created by the National Government, *Smith v. Reeves*, 178 U.S. 436, 446, 449 (1900). Moreover, it applies to proceedings in state court, *Alden v. Maine*, 527 U.S. 706, 712 (1999), federal administrative proceedings, *Federal Mar. Comm'n*, 535 U.S. at 760, in admiralty, *In re New York*, 256 U.S. 490, 503 (1921), and in situations where the State's treasury is not implicated. *See Doe v. Regents of the Univ. of California*, 519 U.S. 425, 431 (1997). Consequently, the States have an interest in having this Court review any decision where the lower court has denied or otherwise diminished the States' sovereign immunity.

To remove any doubt about the position of the States, certain principles must be reiterated. First, the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12189, as well as similar state laws have transformed American society for the better. *See Board of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., joined by O'Connor, J., concurring). Second, the ADA is a valid exercise of Congress' power to regulate Commerce, U.S. Const. art. I, 8, cl. 3. Third, the substantive provisions of the ADA apply to the States. Fourth, if the States engage in violations of the ADA, the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), allows federal courts to issue injunctive relief against state officers to stop the violations. *See Miller v. King,* 384 F.3d 1248, 1264-1265 (11th Cir. 2004), *vacated and superseded*, 449 F.3d 1149 (11th Cir. 2006); *McCarthy v. Hawkins*, 381 F.3d 407, 417 (5th Cir. 2004); *Chaffin v. Kansas State Fair Bd.*, 348 F.3d 850, 866-67 (10th Cir. 2003); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 288 (2nd Cir. 2003); *Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 913 (7th Cir. 2003); *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1187 (9th Cir. 2003); *Carten v. Kent State Univ.*, 282 F.3d 391, 396 (6th Cir. 2002); *Randolph v. Rodgers*, 253 F.3d 342, 348 (8th Cir. 2001). Fifth, Congress may abrogate sovereign immunity for ADA damages claims that involve an actual constitutional violation. *United States v. Georgia*, 126 S. Ct. 877, 881 (2006).

However, the States, like the University of Puerto Rico, dispute whether Congress may abrogate sovereign immunity for ADA damages claims that do not involve constitutional violations. Put another way, if state officials violate the law, but do not violate the Constitution, the State should not be exposed to monetary damages.

REASONS FOR GRANTING THE WRIT

Although Congress, using its power to enforce the Fourteenth Amendment, U.S. Const. amend. XIV, § 5, may abrogate the State's sovereign immunity, *see Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), the exact scope of Congress' authority to abrogate remains uncertain. While it is clear that Congress may abrogate sovereign immunity for statutory claims that involve an actual constitutional violation, *Georgia*, 126 S. Ct. at 881, it is unclear whether Congress can abrogate sovereign immunity for statutory claims that do not involve a constitutional violation. There are compelling reasons why abrogation should be limited to statutory claims that also involve a constitutional violation. Moreover, Courts' decisions determining whether Congress has abrogated sovereign immunity are ambiguous, contradictory, and inconsistent. For example, a person who is denied employment because of age or disability is prohibited from recovering damages. *See Garrett*, 531 U.S. at 374; *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91 (2000). Yet, an employee who is denied a fringe benefit can recover damages. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 739 (2003). Review should be granted to provide guidance which will resolve these contradictions.

This Court should grant review to: (1) determine whether abrogation is possible for statutory claims that do not involve actual constitutional violations; and (2) clarify the test for determining if Congress has abrogated sovereign immunity.

I. THIS COURT SHOULD DETERMINE WHETHER ABROGATION IS POSSIBLE FOR STATUTORY CLAIMS THAT DO NOT INVOLVE A CONSTITUTIONAL VIOLATION.

A. Although This Court Has Implied that Abrogation is Not Possible for Statutory Claims that Do Not Involve a Constitutional Violation, the Lower Courts are Divided.

This Court should grant review to determine whether abrogation is possible for statutory claims that do not involve a constitutional violation. Although this Court has found abrogation when the statutory claim involved a constitutional violation, *Georgia*, 126 S. Ct. at 881; *Tennessee v. Lane*, 541 U.S. 509, 518 (1978), it has consistently rejected abrogation when the statutory claims did not involve a constitutional violation. *See generally Garrett*, 531 U.S. at 364; *Kimel*, 528 U.S. at 62; *Alden*, 527 U.S. at 748; *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 636 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) (all holding that the States were immune from statutory claims that did not involve constitutional violations). *But see Hibbs*, 538 U.S. at 736 (finding abrogation for a federal statutory claim that did not involve a constitutional violation, but did involve gender discrimination). In other words, this Court's opinions implicitly distinguish between claims involving constitutional violations and claims that do not involve constitutional violations.

However, because this Court has never squarely addressed the issue of whether sovereign immunity can be abrogated for statutory claims that do not involve a constitutional violation, the lower courts are divided. The Eighth Circuit, the Supreme Court of Nebraska, and several

district courts have held that sovereign immunity bars particular statutory claims that do not involve a constitutional violation. *See Klingler v. Director, Dep't of Revenue*, 455 F.3d 888, 897 (8th Cir. 2006) ("Title II did not validly abrogate Missouri's sovereign immunity in the context of these challenges to its surcharge on parking placards."); *Keef v. Nebraska Dep't of Motor Vehicles*, 716 N.W.2d 58, 65-66 (Neb. 2006) ("The holding in *Lane* was limited by the Court to when a fundamental right, such as access to the courts, is at issue. . . . But such a fundamental right is not at issue in the present appeal."); *Doe v. Board of Trs. of the Univ. of Illinois*, 429 F. Supp. 2d 930, 939 (N.D. Ill. 2006) (because education is not a fundamental right, "Title II, as applied to the postgraduate state university program at issue in this case, exceeds Congress's power under section five"); *Press v. State Univ. of New York at Stony Brook*, 388 F. Supp. 2d 127, 134 (E.D.N.Y. 2005) ("the application of Title II to a case involving a State's alleged denial of access to post-secondary education on the basis of disability, is an abuse of the Section 5 power of Congress."); *Buchanan v. Maine*, 377 F. Supp. 2d 276, 278 (D. Me. 2005) ("*Lane* does not extend to non-fundamental, though important, rights protected by Title II."); *Johnson v. S. Conn. State Univ.*, 2004 WL 2377225, at *4 (D. Conn. Sept. 30, 2004) (higher education case; "in the wake of *Lane*, it appears that a private suit for money damages under Title II of the ADA may be maintained against a state only if the plaintiff can establish that the Title II violation involved a fundamental right."); *McNulty v. Board of Ed. of Calvert County*, 2004 WL 1554401, at *3 (D. Md. July 8, 2004) ("education is not a fundamental right for the purposes of Title II, and therefore, States continue to enjoy Eleventh Amendment immunity from suits for money damages."); *Roe v. Johnson*, 334 F. Supp. 2d 415, 422 (S.D.N.Y. 2004) ("Because of

the absence of legislative findings establishing a pattern of unconstitutional discrimination in [the] context [the granting of licenses to professionals], this application of Title II is not a valid exercise of congressional power under Section 5 and does not abrogate a state's Eleventh Amendment immunity."). *See also Pace v. Bogalusa City School Bd.*, 403 F.3d 272, 303 (5th Cir. 2005) (*en banc*) (Jones, J., joined by Jolly, Smith, Barksdale, Garza, & DeMoss, JJ., concurring and dissenting) ("ADA Title II, apart from the *Lane* scenario, does not validly abrogate States' Eleventh Amendment immunity").

In sharp contrast, other courts, including the court below, have held that sovereign immunity is abrogated for broad classes of claims that do not involve constitutional violations. *See Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 490 (4th Cir. 2005) (all claims involving higher education); *Association for Disabled Americans, Inc. v. Florida Int'l Univ.*, 405 F.3d 954, 958 (11th Cir. 2005) (all claims involving higher education); *Phiffer v. Columbia River Corr. Inst.*, 384 F.3d 791, 792-93 (9th Cir. 2004) (virtually all claims under Title II of the ADA). Review should be granted to resolve this conflict and to determine explicitly whether Congress may abrogate sovereign immunity for statutory claims that do not involve a constitutional violation.

B. Abrogation Should Be Limited to Statutory Claims Involving a Constitutional Violation.

If review is granted, then this Court should declare that Congress' power to abrogate sovereign immunity is limited to claims of actual constitutional violations. In other words, to the extent that a federal statute provides

substantive rights that are the same as those guaranteed by the Constitution, congressional abrogation of sovereign immunity is possible.[1] Conversely, to the extent that a federal statute provides substantive rights that are greater than those provided by the Fourteenth Amendment, congressional abrogation is impossible. As a result, the question of whether sovereign immunity has been abrogated will turn on whether the litigant has stated a claim for a constitutional violation. If so, then the State may be sued for damages.[2] If not, then the claims are barred by sovereign immunity.

There are several compelling reasons to adopt a rule that abrogation is limited to statutory claims that also involve constitutional violations. First, and most importantly, there is no ambiguity or uncertainty. Under this Court's current approach to determining abrogation, the lower federal courts have to decide whether the States violated the Constitution in the past, whether these violations are sufficient to constitute a pattern, determine

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[1] At present, there is no mechanism for private parties to recover money damages from the States or state agencies for violations of federal constitutional rights. Although 42 U.S.C. § 1983 allows private parties to recover damages from individuals who, acting under color of state law, violate constitutional rights, § 1983 liability cannot be imposed upon the States themselves. *See Will v. Michigan State Police*, 491 U.S. 58, 70 (1989).

[2] Although the States would not have a defense of sovereign immunity in such circumstances, the States should have a defense of qualified immunity. The doctrine of qualified immunity, which was created in the context of 42 U.S.C. § 1983 litigation, allows individuals to escape monetary liability for constitutional violations unless the law is clearly established. *See Harlow v. Fitzgerald*, 457 U.S. 635, 638 (1982). Thus, the States would be liable for money damages only if there were a constitutional violation and the law was clearly established. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

what Congress' response is to the violations, and whether this response is proportionate to the pattern of violations. As explained above on each of these issues, this Court's pronouncements are ambiguous, if not contradictory. In contrast, if abrogation is limited to statutory claims that also involve a constitutional violation, the lower federal courts simply have to determine whether the plaintiff states a claim for a violation of the Constitution.

Second, because it is essentially a bright line rule, limiting abrogation to statutory claims that involve constitutional violations will constrain the judiciary. Like any judicial balancing test, this Court's current approach involves "malleable standards" that are easily transformed into "vehicles for the implementation of individual judges' policy preferences." *Lane*, 541 U.S. at 556 (Scalia, J., dissenting). In other words, the outcome becomes dependent not upon legal principles, but on the whim of a court majority. Yet, while the question of whether a plaintiff has stated a claim for a constitutional violation will involve some ambiguity in some circumstances, there is little or no judicial discretion. In the overwhelming majority of cases, the inquiry will turn on legal principles.

Third, such an approach avoids conflicts with Congress. As Justice Scalia explained, this Court's present jurisprudence:

> casts this Court in the role of Congress's taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter,

> we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to do battle with the United States Congress armed only with a test ("congruence and proportionality") that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed.

Lane, 541 U.S. at 558 (Scalia, J., dissenting). In contrast, a simple focus on whether the statutory claim involves a constitutional violation requires no review of legislative history or even the statutory text setting out the findings. Rather, if Congress has expressed its intent to abrogate, the only issue is whether the complaint states a claim for a constitutional violation as well as a statutory violation.

Fourth, the standard that focuses on whether there is a constitutional violation does not treat "'the States' as some sort of collective entity which is guilty or innocent as a body." *Hibbs*, 537 U.S. at 742 (Scalia, J., dissenting). Under this Court's current jurisprudence, a constitutional violation by a few States can cause *all* States to lose their immunity. In sharp contrast, if the focus is on whether the statutory claim also involves a constitutional violation, a State loses its immunity only if that particular State itself is alleged to have violated the Constitution.

Fifth, this approach subjects the States to liability for damages in circumstances where the States presently avoid liability. When the States violate Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12111-12117, or the Age Discrimination in Employment Act, 29 U.S.C. § 621, the employees cannot recover money damages under any

circumstances. *Garrett*, 531 U.S. at 374; *Kimel*, 528 U.S. at 91-92. Presumably, the sovereign immunity bar applies even if the statutory claim also involves a constitutional claim.[3] However, if sovereign immunity is abrogated for statutory claims involving constitutional violations, the employees could recover when the State violates the Constitution.

Sixth and conversely, a focus on constitutional violations allows the States to escape liability in circumstances where the States presently are exposed to damages. If a federal statute created substantive rights beyond those conferred by the Constitution, the State should be immune from those claims. Its liability is limited to claims that are coextensive with the Constitution. To illustrate, *Hibbs* held that sovereign immunity was abrogated for violations of the family care provisions of the Family and Medical Leave Act, 29 U.S.C. §§ 2612, 2615, & 2617. *Hibbs*, 537 U.S. at 724. Yet, the family care provisions of the Family and Medical Leave Act, while a desirable public policy, are not mandated by the Constitution. Thus, the States would enjoy sovereign immunity from such claims.

Finally, such an approach promotes respect for constitutional values. Although the lay public and many lawyers may frown upon sovereign immunity, the principle is a constitutional value. It should yield only when it comes

[3] For example, suppose that a State adopts a policy mandating that no disabled lawyer or lawyer over the age of forty may be hired in the Office of the Attorney General. Such a policy violates the ADA and the ADEA, but is also unconstitutional because it irrationally discriminates based on disability and age.

into conflict with another constitutional value.[4] That is, it should apply unless and until the State acts contrary to another constitutional value. However, when the State acts consistent with the other constitutional values, then the constitutional value of sovereign immunity should prevail. Thus, unless a State chooses to waive its immunity, the State is immune from common law tort claims, contract claims, and federal statutory claims that do not involve the violation of constitutional rights.

In sum, this Court should consider whether to limit abrogation to those statutory claims that also involve constitutional violations. Because the Petition involves claims that clearly do not involve a constitutional violation, the Petition is an ideal vehicle to consider the issue. Certiorari should be granted.

II. THIS COURT SHOULD CLARIFY THE TEST FOR DETERMINING IF CONGRESS HAS ABROGATED SOVEREIGN IMMUNITY.

Review also should be granted to clarify the test for determining if Congress has abrogated sovereign immunity. As several commentators have observed, there is a great deal of confusion regarding this Court's current approach to abrogation issues. *See* Denise C. Morgan, *A Tale of (At Least) Two Federalisms*, 50 N.Y.L. SCH. L. REV. 615, 615 (2006) ("[e]verything about the area of the law now seems to be in flux"); Mollie Nolan, Note, *A*

[4] Of course, the Supremacy Clause is also a constitutional value. Yet, when a state's statute or policy violates the Supremacy Clause, the *Ex parte Young* doctrine ensures that state officials obey the Constitution.

Difference of Opinion: Reconciling the Court's Decision in Tennessee v. Lane, 30 S. ILL. U. L.J. 357, (2004) ("The *Lane* decision left so much of Title II still open with respect to Eleventh Amendment immunity abrogation and arguably contradicts *Garrett*, so a circuit split is not only likely, but already developing."); David L. Schwan, Note, *When You Come to a Fork in the Road, Take it!: Tennessee v. Lane Takes a New Approach to Section 5 Enforcement Powers*, 43 HOUS. L. REV. 235, 267 (2006) ("Although many courts construe *Lane* to compel a right-by-right approach to Title II, lower courts have not done so uniformly. This split threatens to grow larger, due in part to the Court's failure to mandate the contextual analysis to Title II."). Specifically, this Court's sovereign immunity opinions are ambiguous and/or contradictory concerning the meaning of a history and pattern of constitutional violations and the meaning of "proportionate response."

A. This Court Should Clarify the Meaning of a History and Pattern of Constitutional Violations By the States.

After identifying "with some precision the scope of the constitutional right at issue," *Garrett*, 531 U.S. at 365, this Court's focuses on "whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States. . . . " *Id.* at 368. Yet, this Court's pronouncements on the scope of this inquiry show a lack of clarity concerning the significance of legislative history, the meaning of a pattern of constitutional violations, and the meaning of constitutional violations by the States.

1. This Court Should Clarify the Significance of Legislative History.

First, it is unclear whether the inquiry into congressional findings is limited to the actual statutory text of the statute purporting to abrogate sovereign immunity or whether it extends to all materials and testimony considered by some congressional committee. For example, in *Garrett*, this Court declined to consider "unexamined, anecdotal accounts of discrimination" presented to a congressional task force. *See id.* at 370-71. Indeed, this Court declared, "Congress' failure to mention States in its legislative findings addressing discrimination in employment reflects that body's judgment that no pattern of unconstitutional state action had been documented." *Id.* at 371. However, in *Lane*, this Court reviewed testimony in congressional committee hearings. *See Lane*, 541 U.S. at 524-29.

Thus, it is unclear what role, if any, committee materials and testimony have in the abrogation analysis. While the States believe that only the findings in the statutory text should be relevant, the States and the lower federal courts need clarification on this point.

2. This Court Should Clarify The Meaning of Pattern of Constitutional Violations.

Second, this Court has been inconsistent regarding the meaning of pattern of constitutional violations. In *Garrett*, the Court found that the extensive congressional findings regarding unconstitutional discrimination against the disabled were insufficient to establish a pattern of constitutional violations. *Garrett*, 531 U.S. at 374. Yet, three years later, in *Lane*, the Court found that this *exact same*

record of congressional findings was sufficient to establish a pattern of constitutional violations. *Lane*, 541 U.S. at 528-29.

This contradiction cannot be explained by simply asserting that *Garrett* was about employment discrimination and *Lane* concerned the fundamental right of access to the courts. As the lower federal courts have recognized, *Lane* explicitly found that there were sufficient congressional findings to establish a pattern of constitutional violations in *any context* of Title II. *See Constantine*, 411 F.3d 474 (4th Cir. 2005) ("After *Lane*, it is settled that Title II was enacted in response to a pattern of unconstitutional disability discrimination by States and non-state government entities with respect to the provision of public services. This conclusion is sufficient to satisfy the historical inquiry into the harms sought to be addressed by Title II."); *Miller*, 384 F.3d at 1272 ("*Lane* considered evidence of disability discrimination in the administration of public services and programs generally, rather than focusing only on discrimination in the context of access to the courts, and concluded that Title II in its entirety satisfies [the] step-two requirement that it be enacted in response to a history and pattern of States' constitutional violations. We are bound to that conclusion as to step two."). *See also Cochran v. Pinchak*, 401 F.3d 184, 191 (3rd Cir. 2005) (Agreeing with *Miller*). If the congressional findings are insufficient to establish a pattern of constitutional violations in the relatively narrow context of employment, then surely they are insufficient in the broader area of provision of public services. Conversely, if the findings are sufficient for all aspects of the provision of public services, then surely they are adequate for the narrow context of employment.

Regardless of whether *Garrett* or *Lane* represents the correct approach, the States and the lower federal courts have a pressing need for this Court to decide definitively what constitutes a pattern of constitutional violations.

3. This Court Should Clarify the Meaning of Constitutional Violation by the States.

Third, this Court has been ambiguous about the meaning of constitutional violations by the State. On the one hand, the Court has repeatedly suggested that unconstitutional conduct by local governmental entities is irrelevant in determining whether the States had engaged in a series of constitutional violations. *Garrett*, 531 U.S. at 368-69; *Kimel*, 528 U.S. at 89; *Florida Prepaid*, 527 U.S. at 640. However, in *Lane*, this Court held that the conduct of local governmental entities was relevant in determining whether the States had violated the Constitution. *Lane*, 541 U.S. at 527 n.16. In other words, it is unclear whether the States are going to be punished for the "sins" of local governments. Regardless of how it decides the issue, this Court should clarify the relevance of constitutional violations by local governments.

Even if unconstitutional conduct by local government is irrelevant, it is unclear how many States must commit violations before there is a pattern of violations. In *Kimel*, the Court stated that constitutional violations by one State or even several States does not constitute a pattern of constitutional violations. *Kimel*, 528 U.S. at 90. Similarly, Justice Kennedy suggested that if the States had engaged in a pattern of unconstitutional conduct, "one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation

and discussion of the constitutional violations." *Garrett*, 531 U.S. at 376 (Kennedy, J., joined by O'Connor, J., concurring). Both of these pronouncements suggest that a pattern must involve a number of States and a number of violations. However, the exact parameters remain unclear. This Court should clarify how many States must violate the Constitution to justify abrogation of sovereign immunity for all States.

B. This Court Should Clarify The Meaning of Proportional Response.

If there is a pattern of constitutional violations by the States, this Court must determine whether Congress' *response* is proportionate to the finding of constitutional violations.[5] *Florida Prepaid*, 527 U.S. at 646.

1. This Court Should Clarify What Is Considered Congress' Response.

This Court's opinions are contradictory as to exactly what is considered Congress' response. Is it the abrogation of sovereign immunity or the substantive rights created by the underlying statute?

On the one hand, in *Florida Prepaid*, the Court balanced the abrogation of sovereign immunity against the purported pattern of constitutional violations. *Id.* at 646-48. In other words, the Court decided, "whether subjecting

[5] If there is no pattern of constitutional violations by the States, then Congress has not acted properly and the inquiry ends. *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999). In such a situation, sovereign immunity has not been abrogated.

States and their treasuries to monetary liability at the insistence of private litigants is a congruent and proportional response to a demonstrated pattern of unconstitutional conduct by the States." *Hibbs*, 538 U.S. at 744 (Kennedy, J., joined by Scalia & Thomas, JJ., dissenting). On the other hand, in later cases, the Court has balanced the substantive rights created by the statute for which abrogation was sought against the purported pattern of constitutional violations. *Lane*, 541 U.S. at 531-33; *Hibbs*, 538 U.S. at 737-39; *Garrett*, 531 U.S. at 372; *Kimel*, 528 U.S. at 83. This Court should clarify what is meant by Congress' response – the abrogation of sovereign immunity or the substantive rights created by the statute.

2. This Court Should Clarify the Meaning of Proportionate Response.

If Congress' response means the substantive rights created by the statute as opposed to the mere abrogation of immunity, then there are numerous issues concerning the meaning of "proportionate."

First, this Court should clarify whether a proportionate response ever includes abrogation for statutory claims that do not involve a constitutional violation. When confronted with a statutory claim that does not involve a constitutional violation, this Court consistently has rejected abrogation. *See Garrett*, 531 U.S. at 364; *Kimel*, 528 U.S. at 78; *Alden*, 527 U.S. at 748; *Florida Prepaid*, 527 U.S. 627 at 636; *Seminole Tribe*, 517 U.S. at 72-73. However, in *Hibbs*, this Court found abrogation for a statutory claim that did not involve a constitutional violation, but did concern gender discrimination. *Hibbs*, 538 U.S. at 738. Thus, there is confusion as to whether abrogation for

statutory claims that do not involve a constitutional violation is ever proportionate. As explained in more detail above, the lower courts are divided on this issue.

Second, this Court should clarify whether the proportionality inquiry involves *all* applications of the statute or *only* application of the statute to the case before the Court. In *Hibbs*, *Garrett, Kimel*, and *Florida Prepaid*, this Court "measured the full breadth of the statute or relevant provision that Congress enacted against the scope of the constitutional right it purported to enforce." *Lane*, 541 U.S. at 551-52 (Rehnquist, C.J., joined by Scalia, Kennedy, and Thomas, JJ., dissenting). *See also Garrett*, 531 U.S. at 372; *Kimel*, 528 U.S. at 83; *Florida Prepaid*, 527 U.S. at 648. Thus, in *Hibbs*, the Court found proportionality because the substantive statute for which sovereign immunity was being abrogated was limited to "the fault line between work and family – precisely where sex-based overgeneralization has been and remains strongest – and affects only one aspect of the employment relationship." *Hibbs*, 538 U.S. at 738. Conversely, in *Lane*, the Court refused to address the full scope of the substantive statute for which sovereign immunity was being abrogated. *Lane*, 541 U.S. at 530-31. Instead, the Court simply declared that the proportionality standard was met because its holding only applied to "the class of cases implicating the accessibility of judicial services." *Id.* at 531-32. The former approach allows this Court and the lower courts to make broad pronouncements. The latter approach results in narrow judicial decisions but promotes litigation. This Court should clarify whether the inquiry is the full breadth of applications or merely discrete applications.

CONCLUSION

For the reasons stated above and in the Petition itself, the Petition for Certiorari should be **GRANTED**.

Respectfully submitted,

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